Supreme Court, U.S.
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No. 91-2040

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J.M., guardian ad litem
of his unborn child

Petitioner,

-against-

V.C.,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY ADDRESSING *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY*

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ARGUMENT

Introduction

Following the filing of the Petition for Certiorari by JM, as Guardian the Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 1992 WL 142546 (U.S.) (hereafter, "*Casey*"). JM submits this supplemental brief to show how *Casey* enhances the merits of his petition.

By identifying those legal principles articulated by the Court and the Dissent which support JM's substantive position, JM risks the perception that his is inconsistent with other views of the very same Justices. This is actually the strength of his petition: the facts of the JM case directly join the issues in such a way that the Court may reach the type of consensus which shall eliminate the confusion and provide the repose in the law of abortion that both the Joint Opinion and the Dissent in *Casey* found necessary.[1] By offering the JM case as a solution to the task undertaken by *Casey*, the petitioner does so with respect for the expressed plea of the Joint Opinion that *Casey* be viewed as a resolution of a divisive national debate, while observing the obvious merits of

[1] See, *Casey*, Slip Op. at 3 (Joint Op.); Rehnquist, C.J., Dissenting, at 3 ("the state of confusion and disagreement warrants reexamination of ... *Roe*").

principles found in the opinion of both the Court and Dissent.

In the view of JM, the unresolved conflict of competing legal principles found in *Casey* shall continue until a single truth is addressed directly and correctly: the unborn child is in reality a human being, a person in fact. For the sake of adopting common ground and identifying a fact with which no responsible jurist can disagree, we observe that all must acknowledge that a child twenty six weeks of age post conception is in fact a human being regardless of whether that child is, by fate, prematurely born, or remains within his or her mother's womb. By this acknowledgment resolution of the conflict and confusion shall naturally flow.[2]

By not reexamining the question whether the unborn child possesses rights under the Due Process Clause of the Fourteenth Amendment, *Casey* failed to reexamine *Roe* in its most essential element.[3] The level of confidence necessary for the Court's decision to eliminate confusion and provide repose cannot be achieved as long as reexamination and substantive analysis is

[2] Justice Stevens alone addresses the question in *Casey*. Stevens, J., Dissenting, Slip Op. at 2, 3. His statement that the Joint Opinion implies that the child is not a "constitutional person" is no more true than the observation that the Joint Opinion implies that a child, after viability, is unequivicably a person in fact. the later contradicts the former. *Casey* addressed neither.

[3] See, related observation of Justice Scalia, dissenting Slip Op. at 4.

incomplete and the reaffirmation or overruling of principles hangs by the thread of a single future judicial appointment.[4]

POINT I

ALTHOUGH, TO BE JUST AND LASTING, THE CONSTITUTIONAL PRINCIPLES GOVERNING A WOMAN'S RIGHTS AND OBLIGATIONS CONCERNING ABORTION REQUIRE THE RECOGNITION THAT A WOMAN'S *GRISWOLD* RIGHTS INCLUDE VOLUNTARY AND FREE DECISIONS CONCERNING PROCREATION, HER RIGHTS CAN ONLY REFLECT HER TRUE INTERESTS, AND MUST BE BALANCED AGAINST THOSE OF THE CHILD.

The primary objection to *Roe* is that it is unjust, and the magnitude of its consequences too great for a person of conscience to ignore. The unjust result is built upon unsound application of principles of constitutional law which can be best appreciated when the problem is expressed in its simplest terms: the relative interests of a woman and the competing "interests of the State" have not been satisfactorily identified and the relative weight of the interests when they are balanced have never accurately reflected the real interests of either.[5]

In past cases, whether a woman's desire to have an abortion was recognized as constitutionally protected had been the result of balancing a woman's right against the interests of the state.

[4] See, Blackmun, J., concurring at Slip Op. at 2.

[5] This is substantially acknowledged by the Court. *Casey*, at 31.

The nature of the woman's right was defined in *Roe* as "fundamental" throughout pregnancy. The state's interest in protecting the life of the child was not recognized in *Roe* before "viability" and thereafter the state's interest (described as one to protect "potential life") became a "compelling" one that overcome even the "fundamental" right of the mother. *Roe v. Wade*, 410 U.S. at 163, 164, 93 S.Ct. at 732 (1973).

In *Casey*, the Joint Opinion neither refers to the woman's rights as "fundamental" nor the state's interest as "compelling" but the result is basically the same: a mother may terminate the life of her child before "viability" but the state can prohibit that conduct thereafter. In both analyses it is never precisely defined what is occurring: does the interest of the mother diminish [or is it now waived? See, *Casey*, at 28] or does the state's interest become greater (as stated in *Roe*)? The waxing and waning of either set of interests has often been the subject of criticism. *See, Thornburgh v. A.C.O.G.*, 476 U.S. 744, at 814, 828, 106 S.Ct. 2169, at 2206, 2213 (O'Connor, J. dissenting);[6] *Thornburgh v.*

[6] Justice O'Connor there stated: "I do, however, remain of the views expressed in my dissent in *Akron*, 462 U.S. at 459-466, 103 S.Ct. at 2507-2512. The state has compelling interests in insuring the general health and protecting potential human life, and these interests exist 'throughout pregnancy'." Id. at 461, 103 S.Ct., at 2509.

A.C.O.G., 476 U.S. at 795, 106 S.Ct. at 2197 (White, J., dissenting);[7] *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, at 3057 (1989).[8]

These observations, which support the conclusion that the interests of the state (logically the same throughout pregnancy) and those of a woman (likewise, never changing in character) are at odds with the balancing result that allows prohibition of abortion at one point in time but not at another. One explanation may be the undeniable character of the human life at viability is that of a person - a fact upon which all, although it remains unstated, can agree. Another explanation may be, that although most recognize, or at least suspect, the life in question is a human being from the moment of conception, extraneous considerations (including stare decisis) result in retaining the distinction, no matter how erroneous. The JM case presents the unique facts necessary to clarify the true nature of the interests, offer a valid balancing, and afford an opportunity to do so consistent with the principles of stare

[7] Justice White stated: "the state's interest, if compelling after viability, is equally compelling before viability."

[8] Justice Rehnquist, in his plurality decision wrote: "We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability and there should therefore be a rigid line allowing state regulation after viability but prohibiting before viability."

decisis and concerns expressed in the Joint Opinion in *Casey*.

A. NATURE AND SCOPE OF THE MOTHER'S REAL INTERESTS.

The privacy right upon which *Roe* is based is that found in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965): there are decisions concerning procreation which are protected from state intrusion. *Casey*, Slip Op. at 15. That it is not the role of the state to dictate a particular lifestyle to women is well stated in *Casey*:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the state to insist she make the sacrifice. *Casey* at 10.

The force of this imperative suggests that no policy or constitutional principle can last which is based, intentionally or otherwise, upon a philosophy that a woman should be a carrier of a child for persons other than herself, be it a state, couples who seek adoption, or a man who is genetically related to her child. We have witnessed this philosophy create abuses in adoption, and give rise to the exploitation found in surrogate parenting contracts that reduce the mother to the role of "surrogate uterus". *See, In The Matter Of Baby M*, 109 N.J. 396 (1988).

But *Casey* casts this privacy interest in general terms. In reality, the interest is in a woman having a voluntary and knowing participation in decisions concerning procreation. To define the precise interest involved we need only look to *Roe* in which the Court listed five potential harms to a woman which were used to conclude that the privacy right in *Griswold* includes the decision to terminate pregnancy. *Roe v. Wade*, 410 U.S. at 153, 93 S.Ct. at 727. The first of these concerns the life and health of a mother. That personal judgments about a mother's health where her life is in danger is a decision that implicates the right of privacy set forth in *Griswold* is undoubtedly sound. *See, Casey*, at 15. It is based upon her rights not only in private judgments, but her fundamental right to life itself. However, the other concerns listed by *Roe* do not justify terminating the life of a child where conception is the result of voluntary conduct: (1) maternity or additional offspring may force upon a woman a distressful life in the future; (2) mental and physical health may be taxed by child care; (3) distress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood.

That these are legitimate concerns that implicate the right of privacy, there is no doubt. But these are reasons to avoid pregnan-

cy in the first instance or to exercise a free choice after birth. New Jersey does not have a compelling interest to interfere with the private choice of a woman or couple to prevent pregnancy. *Griswold, supra*. More importantly, these interests identified by *Roe* are not grounds to permit taking the life of a human being where the couple fail to exercise their *Griswold* rights or intended to conceive. If these were truly reasons to abort a child than the natural father would have a coexisting right with the mother to demand an abortion. All of these inconveniences and embarrassments are experienced by him when the law calls upon him to meet his obligations, even where the child is born out of wedlock. These burdens no longer fall on her alone.[9] If these reasons cannot support his right to demand an abortion, than they do not support such a demand of a mother.

Casey elaborates on the concern pertaining to maternity:

"The mother who carries a child to term is subject to

[9] The fact that a mother is the parent who carries the child does not alone give her the singular power over life and death. Both parents are equal contributors to life, with equal obligations following birth. The significant contribution of a mother who bears the burden of maternity is fairly and justly reflected in the New Jersey law which vests in her the right to choose to be the primary custodian of the child if the parents are separated at birth and disagree on custody. ***Baby M***, 109 N.J. 396, 462, 463 (1988). The fact that she carries and bonds with the child directly bears upon the health and welfare of the mother and child following birth, not the power over actual life itself (App. Vol. II; 136a, 137a)

anxieties, the physical constraints, to pain that only she must bear." *Casey* Slip Op. at 10.

But *Casey* does not suggest that these interests justify taking the life of another human being. *Casey* recognizes that the interest in protecting the life of the unborn at "viability" is greater than that of the mother. Yet "viability" is precisely when these anxieties, physical constraints and pains are realized in their most acute form. *Casey* recognized that the responsibility for the avoidance of these inconveniences rests upon the woman before they are realized.[10] The same reasoning applies before conception.[11] Where conception is the result of rape, or its equivalent, it is apparent that the scope of her privacy right includes decisions about terminating a resultant pregnancy, because she must have a voluntary participation in a decision concerning procreation.

To more precisely focus on the true nature of a mother's interests the two following hypothetical situations, based upon the facts of *Baby M*, 109 N.J. 396 (1988) are of assistance:

[10] The Joint Opinion in *Casey* observes that cutting off the mother's right to abortion has a sense of fairness, stating: "In some broad sense it might be said that a woman who fails to act before viability has consented to the state intervention on behalf of the developing child." *Casey*, Slip Op. at 28.

[11] In addition it is observed that there is little that is truely "private" about the act of abortion. See Appendix, Vol.II, at p. 66 (top) to 67.

1. Bill Stern married his wife, Betsy, with the intent of having a family. After the death of his parents, Bill had no one genetically related to him because most of his family was killed in the holocaust in Germany during World War II. They postponed starting a family so Betsy could finish graduate school, then because Betsy attended medical school and later wished to finish her residency. After a decade Bill and Betsy decided to have a child. After Betsy conceived, she and Bill made appropriate plans for the baby's birth. Subsequently, Betsy changed her mind deciding that the inconveniences of pregnancy and child rearing were incompatible with other personal goals, and at five months, when she began to "show", Betsy told Bill that she decided to have an abortion.

2. Instead of Betsy conceiving, Bill and Betsy entered into a surrogacy contract with Marybeth Whitehead. Marybeth, married with children ages 13 and 11, became pregnant through artificial insemination using the sperm donated by Mr. Stern. The child was genetically related to Mrs. Whitehead. As the pregnancy progressed Marybeth experienced mixed emotions about the contractual promise she made to terminate her paternal rights. When her daughter expressed hope for a baby sister, Mrs. Whitehead reconsidered her ability to surrender the child following birth. She finally advised Mr. Stern, while five months pregnant, that she could not surrender the child. Over the next two months Mrs. Whitehead negotiated a custody arrangement. Mr. Stern refused. Mrs. Whitehead then advised Bill that she would abort the baby unless he agreed to her terms.

A third hypothetical is based upon *Anna J. v. Mark C.,* 286 Cal. Rptr. 369 (1991), *Petition for Review granted, Anna J. v. Mark C.,* 4 Cal. Rptr. 2d 170, 822 P. 2d 1317 (1992):

3. Anna J. was a single mother who entered into a written surrogacy contract with Mark C. and his wife. Anna J. agreed to act as a surrogate mother to carry a child conceived outside Anna's womb using an egg donated by Mr. C.'s wife and the sperm of Mr. C. Anna J. was not genetically related to the child. Anna felt that she was not being treated fairly by Mr. and

Mrs. C. and demanded greater compensation. Mark C. observed that "a deal is a deal" and refused her request. When the baby was six months old Anna J. advised Mark C. and his wife that she would have an abortion if they did not satisfy her demands.[12] Mark C. offered more money to save the child's life. As the negotiations proceeded and the child approached "viability", Mark C. and his wife made a final offer. Shortly after "viability", Anna J. telephoned Mr. and Mrs. C. to make even greater demands. Mr. C. advised her that she could not obtain a legal abortion in California and made no further offer. Anna J. then advised Mark C. and his wife that she planned to go to New Jersey where she can obtain an abortion at any time without fear of criminal or civil sanctions, and that "abortion is her constitutional right". She flew to New Jersey where she repeated her demands for additional compensation.[13]

In each instance the mother's conduct in aborting the child is performed in the name of the constitution. Whether that result is good law depends, in large measure, upon the nature of the life she carries. There is a child held hostage, which is then killed. The justifications found in *Roe* are no more valid in these instances then they would be if a parent took the life a two-day old infant after birth to avoid the stress of child rearing. *See*, generally, *Thornburgh v. A.C.O.G.*, 106 S.Ct. at 2193-2196 (White, J., dissenting). The true interest of a woman is that her pregnancy be the result of a voluntary and intentional act. That we can anticipate

[12] See similar demand found in a letter in *Anna J. v. Mark C., supra* at FN 11.

[13] The great irony of the Anna C. case is that California found that of the three, only Anna C. did not have any parental rights following birth, although under *Roe* she is the only one who will determine if the child shall live at all.

that the cruelty of human conduct will continue to evolve should underscore the need to reexamine the question of whether the unborn child enjoys rights under the Fourteenth Amendment, especially where states refuse to exercise its powers to protect the child.[14]

B. THE COMPETING INTERESTS OF THE STATE, THE CHILD, AND THE FATHER.

Until now, all of the abortion cases decided by the Court have involved balancing the state's interests against that of a woman's. *JM v. VC* brings the child before the Court for the first time. The case compels a reexamination of the conclusion of *Roe v. Wade* that "...the word 'person', as used in the Fourteenth Amendment does not include the unborn." 410 U.S. at 158, 93 S.Ct at 729. In his petition, JM, as guardian, calls for reexamination of this conclusion and Section IX (A) and IX (B) of *Roe v. Wade*.[15]

The analysis of *Roe* (Section IX (A))[16], that an unborn child is

[14] By declaring abortion a "right" the *Roe* Court undoubtedly influenced some to act in a way they otherwise would not. As the world of the Anna C. hypothetical continues to evolve the Court must recognize that *Roe* made it possible, that only it can curb the harm, and that *Roe* will foster bad law.

[15] *See*, *Roe*, 410 U.S. at 156-162, 93 S.Ct. at 728-731. *See*, Petition, J.M., as Guardian, p. 20-59.

[16] 410 U.S. at 156-159, 93 S.Ct. 728-730.

not a "person" under the Due Process Clause, is dependent upon the Court's inquiry into the question of when the life of the person begins (*Roe*, Section IX (B); 410 U.S. 159-162, 93 S.Ct. 730, 731).[17] *Roe* refused to answer this critical inquiry:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. *Roe*, 410 U.S. at 159, 93 S.Ct. at 730.

Ever since the Court has labored under the disability of having never defined the nature of the life which was the subject of its opinions and the basis for an "interest" of the states. This failure and the resultant and substantial uncertainty surrounding the nature of the life is reflected in the language of the Court and imprecise definition of the "state's interest." Opinions of the Court, most often refer to the child as "potential life" and the "state's interests in protecting 'potential life'" *e.g.*, *Roe*, 410 U.S. at 163, 93 S.Ct. at 732 (1973); *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040 at 3057 (1989). In *Casey* the Joint Opinion refers to the child as: "the life or potential life" (Slip Op. at 10); "postconception potential life" (17); "fetal life" (18); "the

[17] *See* discussion, petition of J.M., as Guardian, at 20-28.

life of the unborn" (27); "life" (27); "life or potential life of the unborn" (28); "potential life" (30); and "the life of the fetus that may become a child" (4). Chief Justice Rehnquist, dissenting, refers to the child as "a fetus" (Slip Op. at 9); "unborn human life" (25); "unborn life" (26); and "unborn child" (32); Justice Stevens retains the use of "potential life" (Slip Op. at 4, 6, 8); Justice Blackmun refers to "potential life" (Slip Op. at 8) and "prenatal life" (12); Justice Scalia comments upon the critical importance of the nature of the human life:

> The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. Scalia, J. dissenting, Slip Op. at 4. (Emphasis in original)

The interests of the state are dependent, for this definition, upon the nature of the life involved. Disagreement on the ultimate outcome of the balancing of the interests shall perpetuate therefore until the court undertakes to define the nature of the life and when the life of the person, in fact, begins.[18] But why does the state have any "interest" and how can it be so important for *Roe* to

[18] *See* discussion, Appendix, Vol. II 45a-51a.

deem it "compelling" enough to defeat a "fundamental" right if there is no person in fact? It isn't that a human being exists because an interest is recognized, but rather the interest of the state is recognized because the court intuits that a human being exists.[19]

Where a state has the power to protect the life of a person, that person, must possess a corresponding right.[20] The nature of the state's interest is in its *parens patriae* jurisdiction. *See, Santosky v. Kramer*, 455 U.S. 745, 766, 102 S.Ct. 1388, 1401 (1982). But the *parens patriae* interest of the state cannot exist without a co-existing personal right of the individual being protected.[21] *C.f. Snapp v. Puerto Rico*, 458 U.S. 592, 600, 102 S.Ct. 3260, 3265 (1982); *see, also, Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486, 95 S.Ct. 1029, 1042 (1975); *Raleigh Fitkin-Paul Morgan Mem. Hospital v. Anderson*, 42 N.J. 421 (1964). The definition of

[19] The integrity of the law now requires the Court to acknowledge that there could be no doubt that a child six months old postconception is a human being, a person. Whether or not that person is prematurely born or still lives within a mother's womb is not relevant to the fact that the child is a human being.

[20] It is relevant to observe that either people exist for the state, or the state exists for the people. The founding father's thoughts on the essence of government are reflected in the Declaration of Independence:

"... all men ... are endowed ... with ... rights, that among these are life, ... that to secure these rights governments are instituted among men, ..."

[21] See petition p. 60 (bottom) to 62 (top); Appendix, Vol.II 54a to 82a.

the nature of the human life also implicates a father's rights.[22]

POINT II

STARE DECISIS IS NOT A BAR TO REEXAMINATION OF WHETHER THE UNBORN CHILD ENJOYS CONSTITUTION RIGHTS. THE CONCERNS EXPRESSED IN *PLANNED PARENTHOOD OF S.E.PA. V. CASEY* HAVE NO APPLICATION TO THE ISSUES PRESENTED BY JM AS GUARDIAN.

In reaffirming that portion of *Roe v. Wade* which found that the Due Process Clause of the Fourteenth Amendment "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *Roe*, 410 U.S. at 153, 93 S.Ct. at 727, the Court in *Casey* expressly declined to state that *Roe* was correctly decided either on constitutional principles[23] or moral grounds,[24] and articulated a reluctance to do so.[25]

The Court, not being able to affirm either *Roe's* correctness or

[22] It determines whether in fact a father has a child on whose behalf he can act. In addition, once it is established that there is a child related to him, his own individual rights can be defined.

[23] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding." *Casey*, at 29.

[24] "Some of us as individuals find abortion offensive to our most basic principles of morality, ..." (*Casey*, Slip Op. at 8)

[25] *Casey*, Slip Op. at 11; Slip Op. at 19.

its morality, preserved a mother's right based upon *stare decisis* and special considerations because of a divisive national debate. Whether or not the principles outlined in *Casey* operate as a bar to overturning the mother's rights found in *Roe*, they clearly are not a bar in the JM case on the question of the child's rights.

JM, AS GUARDIAN, MEETS THE CRITERIA SET FORTH BY JUSTICE BRANDEIS IN HIS DISSENTING OPINION IN *BURNET V. CORONADO OIL & GAS CO.*

In his petition, JM, relies upon Justice Brandeis' analysis in his dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-413 (1932) cited by the Joint Opinion in *Casey*, Slip Op. at 12, as providing the kind of reasons which would justify overruling *Roe*. The petition explains the applicability of the Brandeis dissent in *Burnet*. (Petition, p. 28-57; see also 20-28). It merits some additional comment in view of *Casey*.

Two critical distinctions made by Justice Brandeis apply here. First, where the Due Process Clause has been erroneously *applied* (as opposed to erroneously interpreted), overruling the prior decision is more easily justified. That principle has application here because the problem is not one of interpretation (clearly the Due Process Clause textually affirms the right to life of all persons), but rather one of applying a recognized right to a specific circum-

stance. Secondly, Justice Brandeis distinguishes those legal questions which are by their nature mixed questions of fact and law. The legal question of whether the unborn child enjoys constitutional rights is such a question. (Petition p. 20-58).

The enormous technological advances since the time of *Roe* have discovered facts and data which support the conclusion that the unborn child experiences pain in the third trimester, and consistent with the conclusion that the unborn child experiences pain as early as the first trimester (Petition, p. 31-56). The new technology has also developed techniques resulting in discoveries which conclusively establish that the biological life of a human being begins at conception (Petition, p. 31-58).[26]

The Joint Opinion likens *Brown v. Bd. of Ed.*, 347, U.S. 483 (1954) to the type of case referred to by Justice Brandeis. *Casey* observed that the facts which controlled the *Brown* ruling were the same at the time of *Plessy v. Ferguson*, 163 U.S. 537 (1896) which *Brown* overruled, but the *Plessy* court either did not under-

[26] "Viability" is irrelevant to both general inquiries. The child is never "independent" in the sense that she is free from dependence on others for nourishment and protection. "Viability" does not change this fact. The child, however, is "independent" from the moment of concerption in the sense that the child is a separate, complete and unique human being. Viability is only a stage of development no more significant than any other, not a moment defining "essence."

stand them, or the justices, for one reason or another, did not recognize them. *Casey*, Slip Op. at 20, 21. *Casey* explains:

> While we think *Plessy* was wrong the day it was decided, see *Plessy, supra*, at 552-564 (Harlan J. dissenting), we must also recognize that the *Plessy* court's explanation for its decision was so clearly at odds with the facts apparent to the court in 1954 that the decision to examine *Plessy* was on this ground alone not only justified but required. *Casey*, Slip Op. at 21.

These observations have special application to the JM case. Whether or not the *Roe* court believed that it could not determine when the life of a human being began, no one could, in light of the present evidence, dispute that the biological life of a complete, separate and individual human being begins at conception. (Petition, p. 31-58.) In 1981, the Subcommittee on Separation of Powers, Committee of the Judiciary of the United States Senate, found that the life of each human being begins at conception.[27]

The refusal of the court to deal with the factual question of when life begins does not engender confidence in either the *Roe* opinion or the Court, and the comments made by *Casey* concerning the *Plessy* decision have equal application to *Roe*. One can imagine that if the Court granted certiorari in the JM case and *Roe*

[27] The Report on Human Life Bill, Subcommittee on Separation of Powers, Committee of the Judiciary of the United States Senate (19th Congress, First Session, 1981).

is overruled on the question of the child's rights, that *Casey's* statement could be reprinted with small modification to read:

> "society's understanding of the facts upon which a constitutional ruling was sought in 1992 (JM) was thus fundamentally different from the basis claimed for the decision in 1973 (*Roe*)". Slip Op. at 21.

Roe resembles *Plessy* more than *Brown* and *Brown* would more resemble JM. To the observations of the dissent concerning the differences between *Brown* and *Roe* we add that *Roe* does not possess the moral force of *Brown*.[28] Although both decisions met with disapproval, twenty years after *Brown* was decided no responsible public official would publicly state that the decision was not based upon sound moral and legal grounds. Twenty years after *Roe* it is apparent that the force of disagreement is driven by the fact that the decision is not based on solid moral or legal grounds. *Roe* shall never command the respect that *Brown* has. *Brown* corrected a wrong, *Roe* created one.

[28] Also, *Brown* was the product of an unanimous court acting to implement that which was just and moral. *Casey's* call for acceptance of *Roe's* unjust and incorrect ruling is made by three justices of a badly divided Court.

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